Supreme Court, U.S.
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No. 95-77 JUL 13 1995

In The Supreme Court Of The United States

October Term, 1994

Thomas G. Botchie,
Petitioner,

v.

Michael O'Dowd, The Sheriff of Charleston County, and the Retirement Division of the State of South Carolina Budget and Control Board,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of South Carolina

PETITION FOR WRIT OF CERTIORARI

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July, 1995

Questions Presented

Whether, under a proper application of Waters v. Churchill, and Connick v. Myers, a public employee, found to have engaged in speech protected by the First Amendment for which he claims he was fired, can have his claim dismissed upon directed verdict:

a. without the factfinder determining whether the speech was the reason the employee was terminated?

b. when the court applied the Connick balancing test not to the protected speech but to conduct the employee claims never occurred and is a pretext for his firing? Or

c. when no evidence is offered to show that the protected speech in any way disrupted the public employment?

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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1994

Thomas G. Botchie,
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v.

Michael O'Dowd, Sheriff of Charleston County, and the Retirement Division of the State of South Carolina Budget and Control Board,
Respondents.

Petition for a Writ of Certiorari
to the Supreme Court of the
State of South Carolina

Thomas G. Botchie respectfully petitions for a writ of certiorari to review a judgment of the Supreme Court of South Carolina.

Opinions Below

The opinion of the South Carolina Supreme Court is reported at ___ S.C. ___, 456 S.E.2d 403 (S.C. 1995).

Related opinions of that court are reported as Botchie v. O'Dowd, 299 S.C. 329, 384 S.E.2d 727 (S.C. 1989) (Botchie 1); and Botchie v. O'Dowd, ___ S.C. ___, 432 S.E.2d 458 (S.C. 1993) (Botchie 2).[1]

Jurisdiction

This appeal concerns an opinion issued April 3, 1995, by the South

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[1] Botchie 1 reversed summary judgment holding that the Sheriff could not be sued even for unconstitutional conduct if related to a personnel action. Constitutional issues weren't reached. Botchie 2 reversed directed verdict at the close of the plaintiff's case. The Sheriff was required to offer evidence of actual disruption from the protected speech.

Carolina Supreme Court, Botchie v. O'Dowd, 456 S.E.2d 403 (S.C. 1995). A Petition for Rehearing was timely filed and was denied on April 19. Id.. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a), in that the court of last resort in South Carolina has rendered a final judgment respecting the Freedom of Speech guaranty of the First Amendment. The federal question involved is substantial and, as the central issue, was necessarily decided in the state proceedings. The initial pleadings sought relief for termination from public employment based on constitutionally protected speech. No adequate nonfederal grounds support the state court ruling.

Constitutional and Statutory Provisions Involved

The First Amendment provides, in pertinent part:

> Congress shall make no law ... abridging the freedom of speech ... or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances,

and 42 U.S.C. § 1983, which provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured ....

Statement of the Case

This case challenges on Constitutional grounds a South Carolina sheriff's decision to fire a deputy.

In 1987 Petitioner Thomas Botchie

was the highest ranking Deputy Sheriff in Charleston County, South Carolina, at a time when the Sheriff's office was not the County's main crime fighting force, but instead served the Court system by keeping order in various county courts, transporting prisoners to trial, serving court papers, and assisting tax collections. (The County Police Department patrolled the streets). The Sheriff's office was closed on weekends.

In late October, 1987 the elected Sheriff died of a heart attack, and in November the Governor appointed as "interim" Sheriff the unsuccessful Republican candidate for the office from the 1984 election. That Interim Sheriff was Michael O'Dowd, a former subordinate of Botchie's when each served as police officers. O'Dowd took office Friday,

November 6, 1987, and a special election to fill the remaining two years of the unexpired term was scheduled for February, 1988. O'Dowd described it as "a very political atmosphere and a very political situation."

Because O'Dowd had once been Botchie's subordinate, and because O'Dowd claimed to have had a report, which Botchie denied and no other witness substantiated, that Botchie "became enraged and threw furniture around in the office" when O'Dowd was appointed, before taking office O'Dowd checked with Botchie to see if Botchie had any problems serving under O'Dowd. Botchie told the Interim Sheriff he did not have any problem doing so, and would support him 100%. O'Dowd told Botchie he could remain a Deputy.

In O'Dowd's first week he had little interaction with Botchie and no disruptions. As noted, the Sheriff's office was closed on weekends. During their second week together, Botchie was assigned a function which took him out of the office the entire week. It was Botchie's only assignment from O'Dowd, and Botchie performed it so well he received a letter of appreciation for his effort. Botchie had no contact with O'Dowd after that assignment began, and he went on vacation, from Friday, November 20 to December 2.

During his vacation Botchie travelled by car to Boston, and had neither contact with O'Dowd, communication with the office, nor any information about local events. Botchie knew nothing about others who announced

as candidates to oppose O'Dowd for the February, 1988 special election.[2]

The morning of Wednesday, December 2, 1987, Botchie returned to work from his vacation. O'Dowd called him into his office and fired him. Why O'Dowd did that is disputed, although it is the law of the case that Botchie had engaged in protected speech. Botchie 2, 432 S.E.2d at 461.

Before his vacation, while working out of the office on his assignment from O'Dowd, Botchie had chanced upon an acquaintance who asked him, during a "minute or two" conversation, to work actively for the Republican Party, O'Dowd's party. Botchie declined the invitation, explaining he had lost

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[2] O'Dowd was defeated in that election.

confidence in the Republican Party because two state legislators had not been truthful about their role in the process by which the Interim Sheriff was selected. Since Botchie had often run the office when the elected Sheriff was absent, after the Sheriff died Botchie mentioned to the two legislators he was willing to serve as Interim Sheriff.

Botchie had been on military recall in 1984 when the last Sheriff election had been held. Botchie is apolitical and had more than once declined invitations to himself run for Sheriff. But when the county needed an Interim Sheriff, Botchie reasoned that he knew the job, knew being Interim Sheriff would not hurt his career, and knew it would save the County money. So he expressed his willingness to serve in that temporary position.

When Botchie discussed it with them, the legislators claimed to have no role in the process, so Botchie let the matter drop. Later, Botchie saw the same legislators taking credit for O'Dowd's selection. Both assertions could not be true: either the legislators were involved, and told Botchie they were not, or they were not involved, and improperly took credit before O'Dowd. This concerned Botchie, and affected his confidence in the Party.

Botchie's speech has been held to have constitutional protection. Although during the conversation Botchie made no comments about O'Dowd, O'Dowd believed Botchie's conversation threatened his chances for re-election, 432 S.E.2d at 461, so he terminated Botchie. O'Dowd told Botchie that he would tell the press

that a "personality conflict" existed, and O'Dowd wrote him a letter of recommendation.

Botchie filed suit against O'Dowd and also named as a party, solely for purposes of complete relief, the state entity which governs Botchie's retirement. Botchie plead deprivation of his First Amendment rights and sought relief under 42 U.S.C. § 1983.

In his Answer O'Dowd contended he discharged Botchie for "unsatisfactory job performance." He also thought Botchie's comments about the legislators was "undermining his political career as Sheriff." 432 S.E.2d at 461.

To support the contention that Botchie was terminated for poor job performance, O'Dowd specified a particular assistant prosecutor who had

supposedly reported problems with Botchie. Botchie called that assistant as a rebuttal witness, and she denied in all respects the account given by O'Dowd, including denying having any conversation whatsoever with O'Dowd about the matter. At trial, Botchie argued that O'Dowd's explanation was a pretext to mask his retaliating against Botchie for daring to criticize the integrity of two Republican legislators.

Despite the unresolved factual conflicts, and Botchie's claim that O'Dowd's testimony was pretext, the trial court directed a verdict at the close of all the evidence. The trial court purported to take into account the contention that O'Dowd's rationale for dismissal was a pretext, but upheld the termination, contending that viewed

favorably to Botchie the only inference to be drawn was that Botchie's "speech," had a detrimental impact on his working relationship with O'Dowd.

While appeal was pending before the South Carolina Supreme Court, this Court announced its decision in Waters v. Churchill, ___ U.S. ___, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994). The state Supreme Court affirmed directed verdict against Botchie, holding

> the trial judge properly considered all the evidence surrounding Botchie's discharge in ascertaining whether O'Dowd acted in good faith upon a reasonable belief that Botchie's speech demonstrated disloyalty or created disruption to the Sheriff's department.

456 S.E. 2d at 405-406, App. A, infra. The state court determined the second prong of Connick was satisfied, eliminating the need to present to the jury any fact issue.

Botchie sought rehearing, arguing that the record had not been construed favorably to Botchie, and that both Connick and Waters had been incorrectly applied. Rehearing was denied, and this Petition followed.

Reasons for Granting the Petition

Justice Scalia's concurring opinion in Waters v. Churchill, ___ U.S. at ___, 114 S.Ct. at 1897, 128 L.Ed.2d at ___ (1994), notes that the responsibilities of the fact-finder and the court are not clearly established when a public employee alleges his employment has been ended because he exercised a Free Speech right. That concurrence also notes, 114 S.Ct. at 1895, that constitutional adjudication without fully understanding

the facts "offends the doctrine that constitutional questions that need not be addressed should be avoided." Justice Stevens, dissenting in Waters, states that the critical issues are whether the speech was protected (a question of law), and whether it was the basis for the sanction (a question of fact). 114 S.Ct. at 1898. This appeal seeks to correct the clear error of the South Carolina Supreme Court, and in doing so to clarify the appropriate sequence for determinations of fact and law when protected speech is involved in a public employee's termination.

1. **The State Court's Analysis Precludes the Factfinder Where Facts are Disputed, Conflicts with Waters v. Churchill, And Isolates Constitutional Analysis From Fact**

Certiorari should be granted to

clarify the proper sequence for resolving necessary questions of fact when public employment is alleged to have been in retaliation for protected speech. After two trials and three appeals to the South Carolina Supreme Court, there is in this case still no determination by a fact finder as to why Botchie was fired. The jury has never been permitted to resolve a single factual question.

"[P]recise and complete findings of fact," are preferred for grappling with the "endless variety" of ways in which First Amendment issues can arise in the workplace, Rankin v. McPherson, 483 U.S. at 382 n.4, 107 S.Ct. 2896 n.4, 97 L.Ed.2d at ___ (1987). Accord, Connick v. Myers, 461 U.S. at 154, 103 S.Ct. at ___, 75 L.Ed.2d at 724-725 (1983); Pickering v. Board of Education, 391 U.S.

at 569, 88 S.Ct. at ___, 20 L.Ed.2d at 817-818 (1968); Jones v. Dodson, 727 F.2d at 1333 (4th Cir. 1984). However, as the analysis has evolved since Pickering, some dispositive issues have become identified as questions of law: for example, if the speech involved is Constitutionally protected. Whether the employee was terminated for protected speech or for a non-speech reason is acknowledged to be a question of fact, but at what point is that fact issue properly resolved? Once speech is found to be protected, the lower courts are sequencing in various ways the remaining factual and legal issues, as set forth below.

The basis of Botchie's termination is disputed. O'Dowd's explanation is claimed to be pretext, and a substantial

showing was made that it was pretext. Multiple trials, and multiple appeals, should not be needed each time such circumstances arise.

In Botchie 2, 432 S.E.2d 458, 461 (1993), the state Supreme Court reversed directed verdict because

> no evidence was offered by O'Dowd to demonstrate that Botchie's speech had a 'detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impede[d] the performance of the speaker's duties or interfere[d] with the regular operation of the enterprise.' Rankin v. McPherson, 483 U.S. 378, 388, 107 S.Ct. 2891, 2899, 97 L.Ed.2d 315, 327 (1987).

Botchie 2, ___ S.C. at ___, 432 S.E.2d at 462, App. A, infra. O'Dowd was supposedly required to make "some showing of actual disruption or disloyalty" stemming from the protected speech. Id..

The protected speech was Botchie's comments about the Republican

legislators. On remand, there was no showing that those comments had any impact whatever in the Sheriff's office. Instead, O'Dowd testified about other things that Botchie supposedly had said about O'Dowd, all of which Botchie denied ever having said. Both the trial court and the South Carolina Supreme Court analyzed not the protected speech Botchie admits, but the pretext speech which O'Dowd claims but Botchie denies. O'Dowd's "state of mind" was deemed sufficiently pure that even though Botchie claimed O'Dowd's account was a fabrication, and pitted O'Dowd's account against Botchie's account, the Connick balancing was deemed to have been satisfied because disruption was presumed based on O'Dowd's pretext.

Construing the record favorably to

Botchie requires that O'Dowd's account be viewed as pretext. Crediting a pretext with Constitutional weight in the Connick balancing is inconsistent with that standard of review, inconsistent with Waters, inconsistent with the Sheriff's obligation under state law to avoid arbitrary action, separates completely from fact the constitutional analysis, and may or may not relate to the actual reason the Petitioner was terminated.

a. **Waters requires a factfinder where reason for discharge is disputed.**

Waters v. Churchill affirmed that the employer must reach his decisions "in good faith, rather than as a pretext." Waters, 114 S.Ct. 1878, 1889 (1994). A public employer cannot properly formulate any theory whatever for retaliating

against an employee for protected speech. Under Waters, the actual reason for termination is constitutionally insufficient if it is a pretext, and in South Carolina a public employer exceeds his authority if he acts arbitrarily. State v. Siegler, 230 S.C. 115, ___, 94 S.E. 2d 231, 235 (1956) (Governor may not use discretion arbitrarily); Dacus v. Johnston, 180 S.C. 329, ____, 185 S.E. 491, 499-500 (1936) (same); Hearon v. Calus, 178 S.C. 381, 183 S.E. 13, 21 (1935) (same). As with other aspects of First Amendment law, the reason for an employee's termination must be reasonable. E.g., Connick v. Myers, 461 U.S. 138, 154, 75 L.Ed.2d 708, 724 (1983) (employer may act on speech reasonably believed disruptive); Pickering v. Board of Education, 391 U.S. 563, 571, 20

L.Ed.2d 811, 819 (1968) (unreasonable to regard speech as per se detrimental to workplace); Torres v. Aponte Roque, 831 F.2d 26, 28 (1st Cir. 1987) (factfinder entitled to disregard unreasonable reasons for discharge); Marciello v. Sumner, 973 F.2d 295, 299 (4th Cir. 1992), cert.den. sub nom. Marciello v. City of Lancaster, ___ U.S. ___, 113 S.Ct. 1048, 122 L.Ed.2d 356 (1993) ("no reasonable trier of fact could conclude. . . ."); Joyner v. Lancaster, 815 F.2d 20, 24 (4th Cir. 1987) (employer must "reasonably apprehend" actual disruption); Tribe, American Constitutional Law, Sec. 12-5, p. 818-819 (2d Ed. 1988) (legitimate purpose cannot be a sham).

Waters does not permit the employer to invent the reasons for discharge.

Waters, at 114 S.Ct. 1889. When a discharge is alleged to have been in retaliation for protected speech, and the dismissal rationale is claimed to have been a pretext, the factfinder must resolve the competing claims about the actual reason for termination. Determining, as required by Waters, whether the employer's conduct was reasonable, given the information available, is for the finder of fact, not for the Court. 114 S.Ct. at 1891. And directed verdict is no more appropriate than was summary judgment in Waters.

The state court has erred, and the error will remain the law of South Carolina unless the Petition is granted. The state court has failed to articulate the basis for its Connick analysis, has erroneously performed Connick balancing

not on the protected speech but as to the "speech" denied by the Petitioner and claimed to be pretext, 456 S.E.2d at 405, App. A, infra, and allocated to the trial court the task which Waters allocates to the fact-finder: determining whether the employer "acted in good faith upon the facts as they were reasonably found to be." 456 S.E.2d at 405. Waters reversed summary judgment and remanded because "a reasonable factfinder" (emphasis added) could determine that the employee had been fired for non-disruptive speech. 114 S.Ct. at 1891. The case was remanded for that determination, and only after actual cause for termination was established by the fact-finder was the trial court to determine whether the speech for which the employee fired was Constitutionally protected. Id..

Botchie's speech was protected, but we do not know if he was terminated for that speech or for the reasons Botchie claims are pretext. Connick balancing can not yet be performed unless it is performed on the protected speech, under the presumption that the protected speech was the basis of the termination. Waters v. Churchill, 114 S.Ct. 1878, 1891 (1994) (Connick balancing applied to the speech for which the employee was fired). To uphold directed verdict without knowing whether the actual reason for discharge was the protected speech requires, under Waters, a finding that a reasonable factfinder could not determine that Botchie was discharged for that protected speech and could reasonably find only that his discharge was for either poor job performance, which is disputed, or

for making comments, which are denied, about O'Dowd's fitness to serve. No such showing has been made or can be made.

b. No deference is due this employment decision.

A public employer who advances a pretext to justify punishing speech cannot have reached its employment decision "reasonably" or in "good faith." Waters, 114 S.Ct. at 1889. Nor has he honored state limits not to exercise his authority arbitrarily. Acting on pretext is "outside the range of what a reasonable manager would use." 114 S.Ct. at 1889. And there are present none of the factors from Waters which support deferring to the employer's decision. O'Dowd was not relying on either "past similar conduct," Waters at ___ U.S. ___,

114 S.Ct. 1888, 128 L.Ed.2d ___, or "personal knowledge of people's credibility." Id. He does not know who he spoke to, other than the individual Botchie conversed with, and O'Dowd purports to know nothing of that person's credibility. No evidence was offered to prove the truth of what the Sheriff supposedly was told, or to establish the reliability of any "sources." O'Dowd has no personal experience or personal knowledge of credibility or past actions of those he supposedly relied upon, as noted in Waters at ___ U.S. ___, 114 S.Ct. 1888, 128 L.Ed.2d ___

2. Lower courts are uncertain how to sequence the fact inquiries and legal issues.

Since Waters was announced, cases have arranged in various ways the

necessary inquiries. The Third Circuit approved submitting part of the analysis to the jury, with the Court repeating the analysis for its own conclusion. Feldman v. Philadelphia Housing Authority, 43 F.3d 823, 831 (3rd Cir. 1994) (jury asked to find if speech protected, then Court considered the same question). The Seventh Circuit has held that once the court determines whether the speech is protected, "the jury was to determine the defendants' motivation" in terminating the employee. Marshall v. Porter County Plan Com'n, 32 F.2d 1215, 1220 (7th Cir. 1994) (upholding Connick balancing before submitting the case to the jury but instructing them to find for the employee if speech was the reason for

termination[3]). The Tenth Circuit has held that a conclusory opinion without findings of fact or reasoning is insufficient for Connick balancing, and must be remanded. Schiller v. Moore, 30 F.3d 1281, 1284 (10th Cir. 1994) (fact

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3 Although it decides constitutional questions hypothetically, Marshall's balancing is consistent with Waters, as different factual possibilities were balanced and the jury instructed which party must win depending on their determination, 32 F.3d at 1220. The Seventh Circuit explicitly recognizes that Connick balancing is to be applied only to the speech for which the employee was disciplined. Wright v. Illinois Dept. Children & Family Services, 40 F.3d 1492, 1499 (7th Cir. 1994). Botchie 3 excludes the jury completely.

finding is "primary function," in the analysis). Id.

By contrast, South Carolina applies Connick balancing to a pretext discharge rationale, without knowing the actual reason for discharge. The South Carolina approach is too much deference to the "facts as the employer thought them to be." Waters at 114 S.Ct. 1889. When compared with prior decisions of this Court and decisions of other Courts of Appeal, the South Carolina decision constitutes significant error both procedurally and substantively, and certiorari should be granted to clarify the proper sequence and correct the error. E.g., Limbach v. Hooven & Allison Co., at 466 U.S. 362; 104 S.Ct. 1843, 80 L.Ed.2d ___ (1984); Hudson v. Louisiana, at 450 U.S. 42, 101 S.C. 971, 67 L.Ed.2d

___ (1981); William E Arnold Co. v. Carpenters District Council, at 417 U.S. 14, 94 S.Ct. 2071, 40 L.Ed.2d ___ (1974); Pittsburgh v. Alco Parking Corp., at 417 U.S. 371-372, 94 S.Ct. 2293-2294, 41 L.Ed.2d ___ (1974). If the decision is permitted to stand, public employment may be conditioned upon sacrifice of important constitutional freedoms.

3. The Questions Presented are Important

Free speech on public issues occupies the highest rung of First Amendment values. E.g., NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913, 102 S.Ct. 3409, ___, 73 L.Ed 2d 1215, ___ (1982). The South Carolina decision renders those freedoms susceptible to erosion by invention, as a pretext is now deemed sufficient to

penalize an exercise of speech rights even though the speech has created no disruption whatever in the public workplace.

Conclusion

The petition for writ of certiorari should be granted.

Respectfully submitted,

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July, 1995

Appendix A

IN THE STATE OF SOUTH CAROLINA

In The Supreme Court

Thomas G. Botchie, Appellant,

v.

Michael O'Dowd, the Sheriff of Charleston County, and the Retirement Division of the State of South Carolina Budget and Control Board, Respondents.

Appeal From Charleston County

Paul E. Short, Jr., Judge

Opinion No. 24222

Heard February 7, 1995 - Filed April 3, 1995

AFFIRMED

Gregg Meyers, of Wise & Cole, P. A.; and N. Steven Steinert, both of Charleston, for Appellant.

Thomas S. Tisdale, Stephen P. Groves, Stephen L. Brown and Elizabeth Barone Luzuriaga, all of Young, Clement, Rivers & Tisdale, of Charleston, for Respondent.

CHANDLER: This is the third appeal of Botchie v. O'Dowd. [FOOTNOTE #1: Botchie v. O'Dowd, 299 S.C 329, S.E.2d 727 (1989) (Botchie I); Botchie v. O'Dowd, ___ S.C. ___, 432 S.E.2d 458 (1993) (Botchie II). END FOOTNOTE].

In this appeal, the trial judge granted O'Dowd's motion for directed verdict on Botchie's cause of action for alleged wrongful discharge in violation of his Constitutional right of free speech. [FOOTNOTE #2: U. S. Const. amend. I; S. C. Const. art. I § 2. END FOOTNOTE] We affirm.

FACTS

Reference is had to Botchie II, in which the essential facts are identical to those in the record before us in this appeal.

ISSUE

The sole issue here is whether the Circuit Court erred in granting O'Dowd's motion for directed verdict.

SCOPE OF REVIEW

"On review of an order granting a directed verdict, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the party against whom the verdict was directed. A jury issue exists where the evidence is susceptible of more than one reasonable inference." Jones v. Ridgely Communications, Inc., 302 S.C. 452, 454, 405 S.E.2d 402 (1991).

DISCUSSION

Three tests have been adopted by federal decisions for determining whether the discharge of a public employee for speech activity violates the First

Amendment. Initially, the trial court must apply the two-prong balancing test enunciated in the seminal case of Connick v. Myers. [FOOTNOTE #3: 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). END FOOTNOTE] The first prong of the Connick test requires a finding by the court that the employee's speech activity implicates a matter of public concern. [FOOTNOTE #4: In Botchie II we determined that prong one was satisfied. END FOOTNOTE] If such a finding be reached, the second prong is invoked and requires that the court balance the government's countervailing interest in fulfilling its responsibility effectively and efficiently. After applying the Connick test, if it be determined that the employee's First Amendment right to free speech is outweighed by the governmental interest,

the governmental interest prevails, prong two is satisfied, and the analysis concludes. However, if it be determined that the employee's right to free speech outweighs the governmental interest, an issue of fact for the jury is thereby created. In such event, the burden is then upon the employee to establish that the protected speech was a substantial or motivating factor in the discharge. The employer may show by a preponderance of the evidence that the employee would have been terminated irrespective of the protected activity. See Waters v. Churchill, ___ U.S. ___, 114 S.Ct. 1878 (1994); Connick v. Myers, supra; O'Connor v. Steeves, 994 F.2d 905 (1st Cir. 1993) cert denied sub nom., Town of Nahant, Massachusetts v. O'Connor, ___ U.S. ___, 114 S.Ct. 634 (1993).

When applying the Connick test the trial court must determine from the employer's conduct whether he acted in good faith upon the facts as they were reasonably found to be. Waters v. Churchill, 114 S.Ct. at 1889. A great deference to the employer's judgment is allowed when close working relationships are essential to fulfilling public responsibilities. Connick v. Myers, 461 U.S. at 150. Further, the character of the employment relationship should be considered; and free speech rights of employees in police departments should be evaluated in a more limited context. Jurgensen v. Fairfax County, Virginia, 745 F.2d 868, 880 (4th Cir. 1984) (Police departments are "paramilitary organizations" and the free speech rights of employees in police departments must

be evaluated with the special character of the organization in mind).

In Botchie II, we specifically remanded this matter for a determination by the trial court as to whether Botchie's speech caused some disruption or indicated disloyalty detrimentally affecting the operation of the Sheriff's department. At trial O'Dowd presented evidence verifying that he reasonably believed Botchie had uttered disloyal comments undermining his standing with the public and damaging his ability to operate the Sheriff's Department. Speech should not be considered in a vacuum, since the manner, time and place of the expression are relevant, as is the context in which the dispute arose. Connick v. Myers, 103 S.Ct. at 1693. We find that the trial judge properly

considered all the evidence surrounding Botchie's discharge in ascertaining whether O'Dowd acted in good faith upon a reasonable belief that Botchie's speech demonstrated disloyalty or created disruption to the Sheriff's Department.

We agree with the trial court's conclusion that Botchie's free speech rights were outweighed by O'Dowd's interest in effectively managing the Sheriffs Department. Since the second prong of the Connick test was satisfied, no issue of fact for the jury was created and directed verdict was properly granted.

AFFIRMED. FINNEY, TOAL, MOORE and WALLER concur.

Appendix B

THE SUPREME COURT OF SOUTH CAROLINA

April 19, 1995

Gregg Meyers, Esquire
PO Drawer 0
Charleston, SC 29402

Re: Thomas G. Botchie v. Michael O'Dowd

Dear Mr. Meyers:

The following Order has been endorsed on your Petition for Rehearing in the above entitled case on appeal.

"Petition for Rehearing is denied.

s/Ernest A. Finney, Jr., C.J.

s/Jean Toal, A.J.

James E. Moore, A.J.

John H. Waller, Jr., A.J.

A. Lee Chandler, A.A.J.

April 19, 1995."

Please be advised that the remittitur in this matter is today being forwarded to the Clerk of Court for

Charleston County.

Very truly yours,

s/ Clyde N. Davis

CLERK

CND,Jr./mcw

Copy to: The Honorable Julie Armstrong
N. Steven Steinert, Esquire
Thomas S, Tisdale, Jr., Esquire
Stephen P. Groves, Esquire
Elizabeth Barone Luzuriaga, Esquire
Stephen L. Brown, Esquire

Appendix C

Order of the Trial Court, issued from the bench, in the trial transcript of the last trial at pages 266-267):

THE COURT: All right, after having carefully considered the matter, this Court finds that the Plaintiff's speech as alleged in this case set out through the testimony and evidence was of both public concern and of public concern to the Plaintiff and was entitled to a limited first amendment protection.

Viewing the evidence in the light most favorable to the Plaintiff, however, I find the only inference which can be drawn from the testimony and evidence is that the Plaintiff's speech did have a detrimental impact on his close working relationship with the Sheriff, the Defendant, and that a close working

relationship between the Sheriff and the Plaintiff as the UnderSheriff was essential in an orderly administration of his duties as Sheriff of Charleston County.

I further conclude that applying the balancing test that the Defendant's interest in maintaining an orderly administration was outweighed by the free expression -- by the Plaintiff's free speech rights.

Therefore, I am going to direct a verdict for the Defendant.

Anything further, sir?

Bring the jury in, please.

(Jury returned to Courtroom at 3:05 P.M.).

(Jury panel excused by the Court.)

MR. MEYERS: I understand your ruling, your Honor. Does the Court then

presume that in fact that was the reason for Mr. Botchie's termination, the speech activity?

THE COURT: I think that's what culminated it, Mr. Meyers. I think there was a disruption once the Defendant was appointed Sheriff other than the Plaintiff, and there were other incidences -- the testimony in my mind demonstrated clearly that there was a personality conflict between the Plaintiff and the Defendant before the Defendant was appointed Sheriff and that this just culminated in the fact that when he made his expression or his speech and this was the final straw, so to speak.

It did have a detrimental impact on the close working relationship that was absolutely required between the Sheriff

and his number one man.

MR. MEYERS: I'm sure the Court is taking into consideration our position that all of that was pretextural and not the real reason.

THE COURT: Yes, sir, I understand that.